

Claimant worked in respondent's warehouse when, on February 4, 2003, while lifting a 35- to 40-pound box, she experienced a stinging or stabbing sensation in her left

hip. Claimant did not immediately tell her supervisor, as she originally thought she had pulled a muscle and that it would get better. However, the pain in claimant's hip continued to worsen.

Claimant did mention to her coworker that she may have injured herself while lifting a box. Claimant began discussing the problem with her supervisor, Jason Pate (respondent's warehouse manager), sometime in March 2003. She advised him that she was having pain in the hip and that it might possibly be connected to her work, but that she was not sure. Mr. Pate acknowledged that claimant discussed pain in her hip beginning in March of 2003, but testified that he thought it was connected to her prior automobile accident in 1998, when she suffered a broken hip, broken leg, broken tailbone and broken pelvis. As a result of that accident, claimant has screws in her hip and pelvis.

Mr. Pate went on to testify that all workers get sore muscles occasionally and that he does not report every ache and pain, nor does he prepare an accident report for every sore muscle encountered. He stated he did not consider sore muscles or back pain from work as an accident, but "if it still exists and they tell me they did it at work, then, yes, I fill out an accident report."¹ Mr. Pate was aware of claimant's prior automobile accident and testified that he was never told of any specific incident at work which may have caused the problem to her hip.

Claimant sought medical treatment with her chiropractor, Dr. Greene, and was ultimately referred for ongoing medical care with Wichita spine surgery specialist Jacob Amrani, M.D. Claimant was diagnosed as having a herniated disc by Dr. Amrani, with the initial recommendation that she undergo epidural injections to alleviate the pain. Claimant was returned to work with respondent, although with restrictions.

In workers' compensation litigation, it is claimant's burden to prove her entitlement to benefits by a preponderance of the credible evidence.² In this instance, claimant's testimony regarding the accident and how it occurred is uncontradicted. The Board finds that claimant has proven that she suffered accidental injury arising out of and in the course of her employment.

Claimant did not provide formal notice to respondent of the accident and the circumstances surrounding the accident until after her appointment with Dr. Amrani on May 6, 2003.

¹ P.H. Trans. at 30.

² K.S.A. 44-501 and K.S.A. 2002 Supp. 44-508(g).

K.S.A. 44-520 requires that notice of accident be given to respondent within 10 days of the date of accident. In this instance, it is acknowledged that claimant did not meet the 10-day deadline of K.S.A. 44-520. However, the statute goes on to state:

The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.³

The Board must consider whether claimant had just cause under K.S.A. 44-520 for failing to provide notice within the 10 days as is required by statute. When just cause is provided to justify a worker's failure to give notice under K.S.A. 44-520, then the time for providing notice is extended to 75 days from the date of accident.

Factors which should be considered in determining whether just cause exists include:

- (1) The nature of the accident, including whether the accident occurred as a single, traumatic event or developed gradually;
- (2) Whether the employee is aware they have sustained either an accident or an injury on the job;
- (3) The nature and history of claimant's symptoms;
- (4) Whether the employee is aware or should be aware of the requirements of reporting a work-related accident, and whether the respondent has posted notice as required by K.A.R. 51-13-1 (currently K.A.R. 51-12-2).⁴

In this instance, claimant's problem, while having a somewhat traumatic start, also continued to worsen, developing over a period of several months. Claimant testified that she initially thought she had pulled a muscle and the condition would improve, but that did

³ K.S.A. 44-520.

⁴ *Russell v. MCI Business Services*, No. 201,706, 1995 WL 712402 (Kan. WCAB Oct. 9, 1995).

not happen. Additionally, claimant had the preexisting problem associated with an automobile accident that needed to be considered. It naturally took a period of time before claimant realized that the condition was not simply a temporary aggravation of her prior injuries from her automobile accident, but was, instead, something more serious.

Claimant began discussing the problem with her immediate supervisor in March, well within the 75-day time limit. Her supervisor, Mr. Pate, did acknowledge that the conversations took place and agreed that claimant testified that she was not sure if she had injured herself at work or if this was a continuation of the car wreck. Under these circumstances, the Board finds that there was just cause for claimant's delay in advising respondent of the accidental injury occurring on February 4, 2003. Additionally, the Board finds the several conversations between claimant and her supervisor were sufficiently specific to put respondent on notice that claimant was having ongoing difficulties and that those difficulties were associated with her employment with respondent. The Board, therefore, finds that claimant satisfied the requirements of K.S.A. 44-520 and the Order of the Administrative Law Judge should be affirmed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Pamela J. Fuller dated September 22, 2003, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of November 2003.

BOARD MEMBER

c: Robert A. Levy, Attorney for Claimant
Brian R. Collignon, Attorney for Respondent
Pamela J. Fuller, Administrative Law Judge
Paula S. Greathouse, Director